SIM KIE CHON

v.

SUPERINTENDENT OF PUDU PRISON & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[CIVIL SUIT NO. A 12 OF 1985]
18 JULY 1985

CONSTITUTIONAL LAW: *Fundamental liberty - Equality clause - Decision not to commute death sentence - Procedure to be followed - Pardon - Decision to commute death sentence - Royal prerogative - Role of Pardons Board - Whether justiciable.*

The defendants made an application to strike out the writ and the statement of claim filed by the plaintiff. The plaintiff had prayed *inter alia* for a declaration that the decision by the Pardons Board (the 2nd defendant) not to commute the death sentence against the plaintiff was unconstitutional as it had violated the provision on equality in the Federal Constitution. The plaintiff had been convicted and sentenced to death for possession of a firearm and ammunition under s. 57(1) of the Internal Security Act 1960. He appealed to the Federal Court but his appeal was dismissed. The Pardons Board considered his case and advised the Yang di-Pertuan Agong not to commute the death sentence. In another case, the death sentence of a person who had been convicted and sentenced to death for murder under the Penal Code was commuted by the Pardons Board. An injunction was granted by the Court against the 1st defendant in respect of the warrant of execution on the eve of the execution.

Held:

[1] Assuming that the decision of the Pardons Board is amenable to judicial review, the Court's powers are limited because judicial review is concerned, not with the decision, but with the decision making process. In the instant case, there is no complaint that the provisions of Article 42 of the Federal Constitution or the procedures in s. 281 of the Criminal Procedure Code have not been complied with. The complaint is against the decision itself and therefore it was held that there is no cause of action.

[2] The facts of each case can never be the same and there cannot therefore be inequality before the law. The inequality can only arise if the procedures leading to the conviction and sentence are not followed as for example, denial of right to Counsel to defend, denial of right to cross-examination of the prosecution witnesses, denial of right to state the defence to the charge or failure to have his case considered by the Pardons Board.

[3] The Court had no jurisdiction to grant an injunction to restrain the Superintendent of Prisons from carrying into effect a sentence in regard to which a warrant of execution was directed to him under s. 281(d)(iii) of the Criminal Procedure Code.

[Writ and statement of claim struck out. Injunction dissolved.]

Cases referred to:

Dato' Mokhtar b. Hashim [1983] 2 MLJ 333; [1983] CLJ (Rep) 101
G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors. [1976] 1 SCC 157
Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1984] 3 All ER 935
Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141
Chiow Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia [1983] 2 MLJ 116; [1983] CLJ (Rep) 92

Legislation referred to:
Criminal Procedure Code, s. 281, (d)(iii)
Federal Constitution, art. 5(1), 8, 42
Internal Security Act 1960, s. 57(1)
Penal Code, s. 302

For the plaintiff - Karam Singh Veriah (P. Sundari with him); M/s. Karam Singh Veriah
For the defendants - Mohd. Rauff Nabi Box; SFC

JUDGMENT

Harun Hashim J:

This is an application by the defendants -

(a) To strike out the Writ and the Statement of Claim filed by the plaintiff on 2 July 1985;

(b) To revoke the stay of execution order granted by this Court on 2 July 1985.

The plaintiff was tried and convicted for possession of a firearm and ammunition without lawful authority under s. 57(1) of the Internal Security Act 1960 and sentenced to death by the High Court at Kuala Lumpur on 14 June 1983. He appealed to the Federal Court but his appeal was dismissed on 26 October 1983 and the death sentence was confirmed. On 26 February 1985 the Pardons Board considered his case and advised that the sentence of death be carried out. On 20 April 1985 His Majesty the Yang di-Pertuan Agong held that in his judgment it is expedient that the death sentence be carried out and ordered execution in the Prison at Pudu in Kuala Lumpur. On 14 June 1985 the High Court at Kuala Lumpur issued the warrant of execution on a sentence of death be carried out on 3 July 1985.

On 2 July 1985 the plaintiff took out a Writ of Summons for the following orders -

1. A Declaration that the Pardons Board has violated Article 8 of the Federal Constitution in failing to exercise impartiality and uniformity in its decisions.
2. A Declaration that the decision not to pardon the plaintiff by the Second defendant while pardoning Dato Mokhtar Hashim is an exercise of prejudice in favour of Dato Mokhtar Hashim and against the plaintiff, when plaintiff's case is lighter than Mokhtar Hashim's case.
3. A stay of execution of the plaintiff pending finalisation of the proceedings herein.
4. Any other or further relief deemed fit and proper by the Honourable Court.

He also filed an *ex parte* application for stay of execution pending the finalisation of these proceedings. I granted the stay as the plaintiff had invoked Article 8 of the Federal Constitution: see s. 1 of the Schedule to the Federal Constitution. In any event failure to grant a stay only hours before the execution was due would have caused irreparable damage.

The grounds for this application are -

1. the matters raised in the said Writ and the accompanying Statement of Claim are non-justiciable and/or outside the jurisdiction of this Honourable Court;
2. the Honourable Court has no jurisdiction to grant a stay of execution on a Warrant of Execution on a Sentence of Death issued against the plaintiff on 18 May 1985;
3. the purported action of the plaintiff is misconceived in that the death sentence pronounced by the High Court and confirmed by the Federal Court is final and conclusive and cannot in any event be reversed.

a It is argued on behalf of the plaintiff that constitutional issues have been raised on the face of the pleadings which ought to be tried. As a general rule the Court will not strike out a Writ if there are triable issues. In the instant case, the only real complaint of the plaintiff is that the Pardons Board did not commute his death sentence to imprisonment whereas in the case of *Dato Mokhtar b. Hashim* [1983] CLJ (Rep) 101 who was convicted on a charge of murder, the death sentence was commuted to life b imprisonment. It is contended that the plaintiff is more deserving of mercy as he had not killed anyone.

It is submitted that as the decision not to commute the death sentence was made under Article 42 of the Federal Constitution, it is open to judicial review. That may be so. In *G. Krishta Goud & J. Boomaiah v. State of Andhra Pradesh & Ors.* [1976] 1 SCC 157, the Indian Supreme Court in considering Article 72 of the Indian Constitution (which is in *pari* c *materia* with Article 42 of the Federal Constitution) said at p. 160:

> that the question of justiciability on the Court's review of Presidential exercise of commutation or respite power has not been affirmed or negatived.

In the *Council of Civil Service Unions & Others v. Minister for the Civil Service* [1984] 3 All ER 935, the House of Lords held that the decision of the Minister to deprive civil servants d of benefits of trade union membership "are amenable to judicial review and are not immune from such review because the instructions were given pursuant to prerogative powers": per Lord Roskill at p. 957. Finally, the word "prerogative" does not appear in Article 42 as it does in Article 181 in respect of Rulers' sovereignty, prerogative etc. "hitherto had and enjoyed shall remain unaffected." It would appear that the royal prerogative is something which is residual and not provided for in the Federal Constitution.

e Be that as it may, and assuming that the decision of the Pardons Board is amenable to judicial review, the Court's powers are limited because "Judicial review is concerned, not with the decision, but with the decision-making process": per Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 at p. 154. In the instant case, there is no complaint that the provisions of Article 42 of the Federal Constitution or the procedures f in s. 281 of the Criminal Procedure Code have not been complied with. The complaint is against the decision itself. On this ground alone I hold that there is no cause of action.

Next it is argued that His Majesty's Command of 20 April 1985 is unconstitutional because the recital is in the following words-

> in exercise of the powers vested in me by s. 281 of the Criminal Procedure Code of the Federated Malay States (Cap. 6) Article 42 of the Federal Constitution and reg. 29 of the g Essential (Security Cases) (Amendment) Regulations 1975 (P.U. (A) 362/1975) and of all other powers thereunto enabling DO BY THESE PRESENTS ORDER ...

It is said that there is no power to order execution under Article 42 which is only concerned with powers of pardon. Instead Article 5(1) which reads:

> No person shall be deprived of his life or personal liberty save in accordance with law

h should have been cited. There is no merit in this argument because death sentences are carried out in accordance with s. 281 of the Criminal Procedure Code. The reference to Article 42 is merely to show that the Pardons Board and His Majesty have considered the plaintiff's case as to whether he merits commutation of sentence.

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Lastly, it is contended that there has been a violation of Article 8 of the Federal Constitution because equality is denied the plaintiff in that Dato Mokhtar received the benefit of clemency whilst the plaintiff did not. The short answer to this is that the two cases are not similar - Dato Mokhtar was convicted of murder under s. 302 of the Penal Code whereas the plaintiff was convicted under the Internal Security Act. Even if two persons are convicted for possession of firearms under the Internal Security Act, and both sentenced to death, the sentence of one being commuted to life imprisonment and the other not, there cannot be inequality before the law because the facts of each case can never be the same. The inequality can only arise if the procedures leading to the conviction and sentence are not followed as for example, denial of right to Counsel to defend, denial of right to cross-examination of the prosecution witnesses, denial of right to state the defence to the charge or failure to have his case considered by the Pardons Board. On the face of the pleadings, I am satisfied that there has been no violation of Article 8 of the Federal Constitution in this case.

Finally, I am bound by the decision of the Federal Court in *Chiow Thaim Guan v. Superintendent of Pudu Prison and the Government of Malaysia* [1983] CLJ (Rep) 92 where it was held that the Courts have no jurisdiction to grant an injunction to restrain the Superintendent of Prisons from carrying into effect a sentence in regard to which a warrant has been directed to him under s. 281(d)(iii) of the Criminal Procedure Code on the ground that mercy is not the subject of legal rights.

For the reasons stated, I granted the application of the defendants and ordered that the Writ and the Statement of Claim be struck out; and the injunction granted on 2 July 1985 be dissolved.

Also found at [1985] 2 CLJ 268